

**STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES**

Before the Commissioner of Financial and Insurance Services

**In the matter of a request for
a declaratory ruling by the
Michigan Chiropractic Association**

Order No. 06-018-M

**Issued and entered
this 11 day of May 2006
by Linda A. Watters
Commissioner**

**ORDER DENYING REQUEST FOR
DECLARATORY RULING**

**I
BACKGROUND**

The Michigan Chiropractic Association (“MCA”) filed a Request for Declaratory Ruling dated February 13, 2006 (“Request”). It raises issues concerning the Commissioner’s implementation of the Patient’s Right to Independent Review Act, MCL 550.1901 *et seq.* (“PRIRA”).

Under PRIRA, a covered person may request the Commissioner to conduct an independent external review of an adverse determination by a health carrier. To determine the medical necessity of a denied health care service, the Commissioner is required to contract with and obtain recommendations from an independent review organization. That organization, in turn, is charged with selecting qualified, impartial, and expert clinical peer reviewers.

The Commissioner has contracted with an independent review organization that utilizes chiropractors that are not licensed in Michigan. The MCA challenged this in a lawsuit filed in the Ingham County Circuit Court.

On April 11, 2006, the Honorable Joyce A. Dragonchuck issued an Order and Judgment in which she granted the Commissioner's motion for summary disposition, disposed of all claims in the matter, and closed the case. The Court found that the MCA lacked standing for the lawsuit. Before that order was issued, the MCA had filed the Request in which it raises the same substantive issues as in the lawsuit.

II ANALYSIS

The Commissioner is authorized to issue declaratory rulings under Section 63 of the Administrative Procedures Act of 1969, as amended, MCL 24.263. It provides:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency....

In its Request, the MCA states its key contentions as follows:

One, or more, members of the Michigan Chiropractic Association have been involved with the PRIRA process and have found that the chiropractic reviewers utilized by the healthcare insurers and by the Independent Review Organization assigned the external review function by the Commissioner obtain "chiropractic opinion" from chiropractors not licensed in the state of Michigan. The chiropractic opinion obtained relates to chiropractic services rendered by Michigan-licensed chiropractors, in the state of Michigan, to Michigan citizens, under the scope of practice of chiropractic narrowly defined by the Michigan Legislature. Objections to the utilization of chiropractors not licensed in Michigan to render chiropractic opinions has been made, as such not-licensed in Michigan chiropractors are neither "qualified", nor can be deemed to be "experts" as envisioned by PRIRA in Section 19. To the extent that the Legislature has determined that the provision of a "chiropractic opinion" is an act that is regulated by licensing requirements, such a limitation, it is asserted, applies to chiropractic reviewers involved in the PRIRA process.

The MCA then states the three questions it seeks to have the Commissioner address:

1. For a chiropractic reviewer provided by an Independent Review Organization to review a claim made under PRIRA, must that chiropractic reviewer be a Michigan-licensed chiropractor to be deemed to be "qualified" and an "expert" as required by MCL 550.1919?
2. For a chiropractic reviewer utilized by a health carrier (as defined in MCL 550.1903(s)) to review a claim for chiropractic services rendered by a Michigan licensed chiropractor, in the state of Michigan, to a Michigan citizen, must that chiropractic reviewer be a Michigan-licensed chiropractor to be permitted to render a chiropractic opinion as provided for in MCL 333.16411 and MCL 333.16261?
3. Do the licensing provisions of MCL 333.16411 and MCL 333.16261, concerning the licensing of chiropractors, apply to all chiropractors participating in the PRIRA process in clinical capacities, e.g., providing opinions with regard to the chiropractic necessity for the chiropractic services that were provided?

The Commissioner should deny the Request for declaratory ruling for two reasons based on the language of MCL 24.263. First, the MCA is not an “interested person.” Second, questions 2 and 3 are not based upon a “statute administered by the agency.”

The question of “standing” in litigation is essentially a test for sufficient interest in a matter to bring a claim. The MCA lacked sufficient interest for the lawsuit and, similarly, lacks sufficient interest for the issuance of a declaratory ruling.

In showing that the MCA lacked sufficient interest in the Circuit Court case, the Commissioner focused upon the first of a three part test for standing set forth in *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 739 (2002):

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b)

“actual or imminent, not ‘conjectural’ or ‘hypothetical.’”... [quoting, *Lujan v Defenders of Wildlife*, 504 US 555-561; 112 SCt 2130 (1992)]

No Injury in Fact Shown

While the law firm states in the Request that it “represents the interests” of the MCA on an “issue of importance to the individual members” of the MCA, what those interests are, and why the issue is important to the members, are not identified or explained. This vacuum would itself be a reason to deny the declaratory ruling.

There seem to be two possible harms that MCA could claim may result from the use of chiropractors who are not licensed in Michigan to perform PRIRA reviews. MCA may be arguing that the use of chiropractors who are not licensed in Michigan to perform PRIRA reviews has injured its members by denying them the opportunity to perform, and be compensated for, those reviews. MCA may also be concerned that a chiropractor who is not licensed in Michigan would, in the course of a PRIRA review, find that certain procedures were not medically necessary when a Michigan-licensed chiropractor would find that they were. Neither argument would be sufficient to establish the MCA as an "interested person" for purposes of a declaratory ruling.

The possibility of missing the opportunity to perform PRIRA reviews does not establish that MCA is an “interested person” because its membership does not encompass all Michigan licensed chiropractors. Even if only chiropractors licensed in Michigan were retained to conduct PRIRA reviews, it is uncertain whether members of the MCA would be hired. Thus, any injury to the MCA's membership is conjectural and not injury in fact. In *Saginaw Fire Fighters Assoc v Police and Fire Dept Civil Serv Comm’n*, 71 Mich App 240, 244 (1976), the union lacked standing because it could not demonstrate

any current members suffered an injury. Likewise, speculative benefits do not confer standing. *Lee, supra*, 464 Mich at 740-741.

Similarly, a concern that chiropractors licensed outside of Michigan might, in the course of performing a PRIRA review, reach a conclusion different from the conclusion a Michigan-licensed chiropractor would reach is purely speculative. To the extent this is a concern, MCA is presumably worried that an out-of-state chiropractor would find that a procedure was not medically necessary when a Michigan chiropractor would find that it was.

MCA has not pointed to any reason why such a different conclusion would be reached. In its attempted lawsuit, the MCA did reference a member chiropractor who had performed treatments that were found not to be medically necessary by an out-of-state chiropractic PRIRA reviewer. But MCA has never alleged or proven that the decision would have been different if the review had been performed by a Michigan chiropractor. Accordingly, a fear that out-of-state chiropractors may make incorrect assessments of medical necessity is pure speculation and does not constitute an injury in fact.

No Injury to a Legally Protected Interest

The MCA lacks a sufficient interest for purposes of a declaratory ruling because it has failed to establish that any injury it may suffer is an invasion of a legally protected interest. Whether a party has a legally protected interest in a case alleging violation of a statutory duty depends on the purpose of the statute.

In *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 692-693 (1999), the court held that an insurance broker did not have standing to claim that his termination violated

the Michigan Civil Rights Act because the plaintiff did not have a legally protected interest:

While plaintiff did have an economic interest that was adversely affected by his discharge, this interest is not legally protected. Section 302 of the Civil Rights Act protects the persons *who are being denied goods and services*, not the persons who are attempting to provide the goods and services.

As discussed above, any economic loss to the members of the MCA is speculative at best. However, even if there were an established economic loss, the members of the MCA are not protected by PRIRA.

PRIRA is designed to protect the rights of individuals that are denied coverage for health care services. PRIRA is "an act to provide review of certain health care coverage adverse determinations made by health carriers..." 2000 PA 251, MCL 550.1901-550.1929. Who obtains rights under PRIRA is made unmistakable by its legislatively mandated title, the "Patient's Right to Independent Review Act."

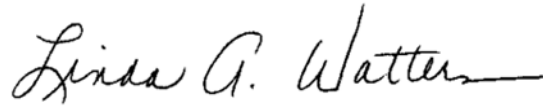
Thus, PRIRA does not confer a right to employment, or a right to payment for services, upon chiropractors. PRIRA does not protect the purported interest of the MCA or its members.

The Public Health Code is not Administered by the Commissioner

The second and third questions in the Request deal with licensing requirements established in MCL 333.16411 and MCL 333.16261. These provisions are within the Public Health Code, which is beyond the purview of the Commissioner. Under MCL 500.200, the Commissioner is "...charged with the execution of the laws in relation to insurance and surety business...."

III
ORDER

Based upon the considerations above, it is ordered that the request for declaratory ruling is denied.

A handwritten signature in cursive script, reading "Linda A. Watters", followed by a horizontal line.

Linda A. Watters
Commissioner